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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 250

REMLER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on March 17, 1967.

CITATION TO OPINION BELOW

The opinion and judgment of the United States Court of Claims will be reported in 179 Ct. Cl. ___, but as yet are unreported, and are printed as Appendix A of this petition.

JURISDICTION

The opinion of the Court of Claims was entered on March 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Armed Services Board of Contract Appeals made final rulings on questions of law in interpreting the specifications, which are in violation of petitioner's rights under the Wunderlich Act.

2. Whether the action of the Armed Services Board of Contract Appeals was arbitrary or capricious or so grossly erroneous as necessarily to imply bad faith in violation of the principals announced in the Wunderlich Act.

3. Whether the action of the Armed Services Board of Contract Appeals deprived petitioner of its right to a full, fair and impartial hearing of its claim.

4. Whether the Court of Claims, under the circumstances, should have considered petitioner's claim *de novo* or have referred the matter back to the Armed Services Board of Contract Appeals for further consideration.

STATUTORY PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act, 41 U.S.C. 321-322) provides:

> § 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official

or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. *Contract-provisions making decisions final on questions of law.*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The pertinent part of the Constitution of the United States, Amendment XIV, provides:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. *Background*—The petitioner submitted a bid on an Invitation for Bids (IFB) issued by the United States (Navy), Bureau of Ships (BUSHIPS), identified as No. IFB-600-930-55s. The contract was awarded to petitioner on 13 June 1955. The contract provided for petitioner to deliver one pre-production model and twenty-six consoles known as Ships Audio Entertainment (S.E.) Systems, together with related items as stated in the contract for an estimated total sum of $103,135.74. The contract was identified as NObs-67010. The original contract was modified to increase the number of consoles to forty and for some minor changes not important here.

The IFB and the final contract both referred to and required the use of Military Specification MIL-A-17053B (Ships), dated 15 July 1954.[1] This specification was drafted by respondent. This specification referred to and required the use of Drawings S6202-3152461, which was also drafted by respondent. The specifications spelled out the requirements for the sound recorder components of the contract. The drawings spelled out the use of certain rotary switches. During the course of the performance of the contract it became evident that the specifications drafted by the respondent were ineffective, defective, inadequate, inoperable, inefficient and so poorly drafted as to be impossible of performance as drafted.

2. *Administrative Claims and Proceedings*—Upon completion of the contract, the petitioner filed a claim for relief with the Contracting Officer under the "changes" clause of the contract.[2] The Contracting Officer denied its claim and the petitioner filed an appeal with the Armed Services Board of Contract Appeals which was denied on 30 April 1962. The full copy of the Board's Findings of Fact are printed in Defendant's Motion for Summary Judgment in the Court of Claims. Petitioner's claims are briefly stated below.

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[1] Schedule pages 7, 8, 9, 10 and 11 of the IFB and the Contract.

[2] Article 2 of the General Provisions (Supply Contract) provides:

> The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. *If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly.* Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer,

A. *Recorder Claim*—Petitioner contends that the military specification (MIL-A-17053B) in the contract was a specific requirement and not a performance guide. It was a required element of the contract. The reference in the IFB and the contract, when read by one familiar with the customs, usage and application in the trade or business, clearly was understood to mean that the contractor was to use a commercial component, namely the Magnecord Company Model PT6AHX (sometimes referred to as the Magnecord or Magnecorder Model PT6 or Model PT63AHX) in its entirety, without any required modification or changes. Thus the contractor would be a fabricator rather than a manufacturer of this requirement of the contract, and could calculate the cost based upon purchase of this item as a commercially available sound recorder off the shelf.

Military Specification MIL-A-17053B(Ships), paragraph 3.7.2 *et seq.* were verbatim specifications of the Magnecord Model PT6AHX as if specifically named, and as such, were restrictive to the use of this component. The restrictiveness of the specification and its similarity with the Magnecord PT6AHX specifications were uncontradicted in the hearings before the Armed Services Board of Contract Appeals.[3] Mr. Russell J. Tinkham, who was the original designer of the Magnecord sound recorder, succinctly sets forth his opinion of said specification in letter of 14 June 1959, addressed to Robert Gray, petitioner's president. A copy of this letter is attached to and is a part of petitioner's original Petition in

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if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." *However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.* (Emphasis added)

[3]Transcript pages 151-234 Tinkham; transcript pages 320-379 Bray and transcript pages 67-70 Greene.

the Court of Claims as Exhibit No. 3 thereof. It is also a part of the Restated Petition by reference and incorporation, and a part of the preliminary ASBCA file. Mr. Tinkham was qualified as an expert in the field of acoustical and mechanical engineering (pages 151 through 156 of the Armed Services Board of Contract Appeals Transcript). Petitioner introduced into the Board hearing as Appellant's Exhibit No. A-6, the September-October 1954 issue, Volume 10, No. 3 of the Tape Recorder Directory published by Audio Devices, Inc., and Mr. Tinkham testified before the Board (Tr. 160-168) that the only sound recorder in the directory that met the requirements of MIL-A-17053-B was the Model Number PT6-AHX manufactured by the Magnecord Company. During this testimony Mr. Tinkham pointed out that the Magnecord Model No. PT6-AHX had a peculiar feature with regard to the rewind and fast forward facilities (Tr. 164) which was also set forth in MIL-A-17053B. He stated further that paragraphs 3.7.2.3 and 3.7.2.4 of the specifications called for a very fast rewind speed and comparatively fast forward speed which was not found in any other recorder to his knowledge (Tr. 165), and that this particular feature was a "boo-boo" not commonly desirable in the trade. Mr. Tinkham testified (Tr. 167-168) that another unique feature of this particular Magnecord Sound Recorder was a bias oscillator being included as a part of the construction of the recording apparatus, and that this requirement was incorporated in paragraph 3.7.2.8 of the specification (Tr. 167). Mr. Tinkham testified that to his knowledge there was never another similar design and that the reason this was done in his design of the Magnecord PT6-AHX was that the Magnecord chose "to build the oscillator into this particular portion of the equipment so that it would pay only on a part of the total recorder equipment and thus save * * * money in royalty payments" (to Armour Research Foundation (Tr. 168)). The respondent admitted at the Board hearing that the specification called for the purchase of a Magnecord Model PT6 as a unit to be fabricated into the contract equipment when its witness Bruce Bray testified "It was my intention that he would

buy it from a manufacturer of tape recorders." (Tr. 361)

At the time of the issuance of the IFB, on or about 28 March 1955, petitioner had determined that the Magnecord Company Model PT6-AHX was available and had secured a price therefor. After the award of the contract to petitioner (in June 1955), without the prior knowledge of either petitioner or respondent, petitioner found that the Magnecord Company Model PT6-AHX was no longer in production and could not be purchased from suppliers. Petitioner notified respondent of this fact. At the request of the respondent, petitioner attempted to find other sound recorders which could be modified and changed with a minimum loss of time and cost. In August 1955, petitioner concluded that the Ampex Model 600 sound recorder could be purchased and modified with a minimum of delay and extra costs. The reworking, replacement, modification and resultant delay and extra costs amounted to changes or changed conditions which were the basis of petitioner's recorder claim.

B. *Switch Claim*—Petitioner contends that military drawing S6202-3152461 was designed by the respondent to describe the use of certain rotary switches. Petitioner was apprised by respondent, prior to the award of the contract, that as to these switches, there were only two sources of supply available to petitioner or to anyone to whom the contract might be awarded, namely, the United States Instrument Company and the J & H Smith Manufacturing Company. Just before the contract was awarded to petitioner, it learned that the United States Instrument Company switches were not available for use in this contract, leaving J & H Smith Manufacturing Company as the sole source of supply and the only company tooled up to manufacture these switches under the military specification drawings S6202-3152461. At about the same time, petitioner was working on another contract for BUSHIPS which required the use of these same rotary switches. Petitioner was having difficulty using these switches as required in the other contract. It soon became apparent that in the instant contract, the use of the switches as specified would not result

in an acceptable product. Petitioner found that the shafts were breaking after installation; that the switch when used and installed as required, made only intermittent contact and was inconsistent, inoperable, ineffective, defective or inefficient. The trouble with the use of the switches was immediately communicated to the Contracting Officer and was immediately made known to respondent's resident inspector. There were numerous communications by consultations, conferences and correspondence between the parties concerned. A number of these communications were introduced as exhibits to petitioner's original Petition to the Court of Claims.[4a,b,c,d,e,f,g,h] These Exhibits were incorporated by reference into the Restated Petition. By letter dated 18 June 1956, BUSHIPS (Mr. L. M. Flaherty) requested petitioner to officially inform BUSHIPS of the causes of the difficulties with the switches and to make recommendations for corrective action.[4a] By letter dated 17 July 1956, petitioner summarized its rejections and experiences with the switches and listed seven (7) causes for the inconsistencies, inefficiencies or failures of the switches and made four (4) recommendations to aid in overcoming the failure of the switches.[4b] The problems with the switches indicated a fault in design

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[4]a. Exhibit No. 1, copy of letter from BUSHIPS to Petitioner, 18 June 1956

b. Exhibit No. 2, copy of letter from Petitioner to BUSHIPS, 17 July 1956

c. Exhibit No. 4, copy of letter from Petitioner to Inspector, July 10, 1957

d. Exhibit No. 5, copy of letter from BUSHIPS to Petitioner, 16 Aug. 1957

e. Exhibit No. 6, copy of Memorandum from H. A. Greene, Jr., July 25, 1957

f. Exhibit No. 7, copy of letter, J & H Smith Manufacturing Co. to Petitioner, November 14, 1957

g. Exhibit No. 8, copy of letter, J & H Smith Manufacturing Co. to Petitioner, December 27, 1957

h. Exhibit No. 10, copy of letter from Petitioner to BUSHIPS, 21 Jan. 1958

rather than in manufacture or in installation. The petitioner had every reason to believe that the switches specified were to be suitable in design and material for the use designated in the specifications. The petitioner had every reason to believe that the switches being supplied and passed by the respondent's inspector at the J & H Smith Manufacturing Company plant, were constructed and tested in accordance with BUSHIPS drawings and specifications. The petitioner had every reason to believe that the approved design and specification would not be inconsistent, defective or inoperable in its designed use as specified in the contract. As a result of the switch difficulties, petitioner was delayed and hindered in the completion and performance of the contract which resulted in excess costs for studies, engineering, designing, reworking and testing which culminated with modifications in the switch design.[4c,d,e,f,g,h] The respondent's witness testified at the Board Hearing that the design of the switch, as originally made, was inadequate for Navy purposes (Tr.280). Respondent's witness also testified at the Board Hearing that the Navy had improved the design of the switch "to the extent of increasing this possibility of point contact" (Tr. 299), and that such change was made after the experience with petitioner on the intermittent contact (Tr. 301, 303 and 305).

C. *Interpretation of Specifications*—In its general demeanor and in its decision, the Armed Services Board of Contract Appeals made rulings of law on the questions of law concerning the interpretation of the specifications. It is the petitioner's contention that these rulings are not final and conclusive as to the questions involved in the specification interpretation concerning both the Sound Recorder and the Switches. These rulings and findings of the Board were contrary to petitioner's rights under provisions of the Wunderlich Act, 41 U.S.C. 321-322, supra. The petitioner is therefore entitled to a hearing *de novo* before the Court of Claims.

D. *Findings Contrary to Evidence*—The Board made findings of fact that were so contrary to the evidence, and that

failed to take into consideration substantial and uncontroverted evidence so as to be fraudulent or capricious or so grossly erroneous as necessarily to imply bad faith. This was contrary to the announced standards of the Wunderlich Act, supra. The petitioner is therefore entitled to a hearing *de novo* before the Court of Claims.

E. *Due Process–Full and Impartial Hearing*–The action of the presiding Board member was arbitrary, capricious and deprived the petitioner of its right to a full and impartial hearing. The presiding Board member chastised the petitioner and its attorney before he ordered the stenographer to take notes of the proceeding. The presiding member failed to rule on written statements of Lloyd Larsen and Harold Nelson, which petitioner's attorney wanted to clarify as part of the Rule 6 papers before the Board, postponing the ruling until the end of the hearing. From the time of the first inquiry by petitioner's attorney, the presiding Board member, Mr. Paul Nelson Culp, said "I understand your position, we will reserve on that." When it became apparent that the testimony of respondent's surprise witnesses would require a rebuttal by petitioner, its attorney asked for a continuance or recess for the purpose of having the oral testimony of Lloyd Larsen, Harold Nelson and A. B. Koessler. A reading of the transcript of the hearing from page 496 to the end gives more detail of petitioner's claim herein. This part of the transcript indicates that the Board member, Mr. Culp, made a finding that was tantamount to a ruling of law. The Board ruling in refusing to reconvene or recess the hearing was in violation of petitioner's due process and contractual rights. In order that this petition for a writ be not unduly lengthy, for more detail, your attention is directed to pages 32, 33 and 34 of the original Petition in the Court of Claims, and to pages 11, 12, 13, 14, 15 and 16 of petitioner's Supplemental Brief in the Court of Claims.

Although the contractor was in default because of failure to deliver timely as required by the terms of the contract, the government did not declare a default and acquiesced in the delays and finally accepted the completed product from

petitioner. The petitioner contends that all the delays were caused by the fault of the government.

3. *Proceedings in the Court of Claims*—Petitioner brought this action for damages (in the amount of $103,782.53) in the Court of Claims by Petition filed March 24, 1965. The action was on the basis of the same claims as were made before the Armed Services Board of Contract Appeals, namely for the increased costs and expenditures due to the restrictive, improper, erroneous, inadequate and faulty specifications and drawings of the government.

In the Court of Claims the petitioner took the position that the petitioner was entitled to a hearing *de novo*. The respondent took the position that the Court could only consider the administrative record of the Armed Services Board of Contract Appeals under the ruling in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709. Upon respondent's Motion for Summary Judgment, the case was referred to a Commissioner for a report. In his report filed April 4, 1966, the Commissioner recommended that summary judgment be granted. Petitioner requested a review of the report of the Commissioner. After additional proceedings by petitioner on the review of the report, on March 17, 1967, the Court of Claims agreed with the Commissioner's recommendation and granted the motion for summary judgment against petitioner.

REASONS FOR GRANTING THE WRIT

In this case, the Court of Claims, acting on the persuasion of the Government, adopted the strict construction of *Bianchi*, supra and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, and *United States v. Utah Construction and Mining Co.*, 384 U.S. 394. The Government would like to consider these cases to mean that under all circumstances the Court of Claims is limited to the administrative record of proceedings. Petitioner believes that within the law established by these cases there is a need for a more

definite understanding of those claims which are entitled to proceed to a trial *de novo*. We believe that the ruling announced here by the Court of Claims is inconsistent with the law of the above cases, in that the exceptions are pertinent here and not the general rule. We believe that the petitioner's contentions with regard to the restrictiveness of the specifications on the Recorder Claim and the petitioner's contentions with regard to the Switch Claim are questions of law and issues of law which should entitle petitioner to a *de novo* hearing under the Wunderlich Act, supra, as a matter of law, not discretion. We further believe that the Court of Claims should have remanded the matter to the Armed Services Board of Contract Appeals for a further hearing with regard to petitioner's claim of violation of its substantive rights of due process and that it did not have a full hearing. This would be pursuant to the finding of this Court in *United States v. Anthony Grace & Sons, Inc.*, supra. Review by this Court is necessary to resolve the important and recurring issue presented by this case, and to eliminate the confusion and uncertainty engendered by decisions of the Court of Claims on this subject since *Bianchi*, supra; *Anthony Grace & Sons, Inc.*, supra, and *Utah Construction and Mining Co.*, supra.

1. In *Anthony Grace & Sons, Inc.*, supra, this Court reiterated its ruling in *Bianchi*, supra, with regard to staying proceedings when the administrative record is defective or inadequate, or reveals the commission of a prejudicial error. In this case, the Court of Claims improperly dismissed petitioner's petition upon consideration of only part of the administrative record and improperly found no error with regard to petitioner's contention of lack of due process and failure to receive a full and impartial hearing. The Court of Claims in its decision made no mention of the violation of petitioner's rights to a full trial and to due process.

One of the purposes of the Wunderlich Act was to "require each party to present openly its side of the controversy and afford an opportunity of rebuttal" at the administrative hearings. H. Rep. No. 1380, 83d Cong., 2d Sess., p. 5.

2. The petitioner contends that the Commissioner and the Court of Claims were in error when they looked only at those parts of the administrative record referred to by the respondent, and insisted that petitioner must point out those parts of the record that were pertinent or the petitioner would would otherwise be held to have failed in its duty to the Court of Claims. In the case of *Fehlhaber Corp. v. United States,* 138 Ct. Cl. 571, 151 F. Supp. 817, certiorari denied, 355 U.S. 87, the Court held as follows:

> "In * * * contractor's suit * * * under changed conditions clause * * * Court of Claims was not required to review the entire record to determine that it contained no substantial evidence to support administrative findings and decisions before proceeding with making its own *de novo* finding."

The Court of Claims accepted the government theory of proceeding on the record and insisted that petitioner point out the applicable part of the administrative record when it should, as a matter of law, based on the pleadings, have accepted petitioner's claim that it was entitled to a *de novo* hearing, according to the circumstances of the case. Even reading the entire administrative record was not an onerous burden.

3. The Armed Services Board of Contract Appeals improperly made findings that were contrary to the evidence and that so ignored substantial expert evidence as to be arbitrary and capricious and to imply bad faith. Thus the petitioner claims the standards of the Wunderlich Act were not satisfied and the petitioner was entitled to a hearing *de novo.* See *Allied Paint & Color Works v. United States,* 309 F.2d 133, 138; *United States v. Hamden Co-operative Creamery Co.,* 297 F.2d 130-135; and *Silverman Bros. v. United States,* 324 F.2d 287-290.

4. The Armed Services Board of Contract Appeals made rulings on questions of law with regard to the interpretations of the specifications which rulings are not final and conclusive under the Wunderlich Act. The petitioner IS entitled

to a hearing *de novo*. The Board rulings on these points were not determinations based upon factual situations covered under the contract terms and, if so, were arbitrary and unsupported by the preponderance of evidence. See *Bianchi*, supra; *Morrison-Knudsen Co. v. United States*, 345 F.2d 833; *Fuller v. United States*, 108 Ct. Cl. 70, 90-102; *Kehm Corp. v. United States*, 119 Ct. Cl. 454, 465-473, all quoted in *Utah Construction and Mining Co.*, supra, rejecting the government contention that claims of this type were not subject to a *de novo* trial in the Court of Claims. Petitioner contends that it has been held by the Court of Claims under similar circumstances that it is clear that the contract, specifications and drawings, when considered together, were fairly susceptible to the construction placed upon them by the petitioner. See *Gus Kraus d/b/a Condor Machine Works v. United States*, 177 Ct. Cl. __, 366 F.2d 975. The Court of Claims has held that specifications subject to misleading reading or implication subject the government to answer to the contractor who has been actually misled to injury. *Helene Curtis Industries, Inc. v. United States, 312 F.2d* 774. Here, petitioner read the specifications clearly to mean the use of the Magnecord Company Model PT6 as a commercial unit as intended by the specification designer, Mr. Bray. He so testified. Mr. Tinkham, the designer of the Magnecord Model PT6 testified (Tr. pp. 157-169, 222, 224, 227 and 228) and has written his opinion (Exhibit 3 of the Petition and Restated Petition) that there was no other recording machine except the Magnecord Model PT6 that met every detail of the specifications, including trade errors and exceptions. It has been proven incontrovertibly, as a fact, that the government specification and the Magnecord Model PT6 specification were one and the same. Mr. Bray even admitted that at the time he wrote the government specification he knew of no other sound recorder which met the specifications as a commercial unit. With regard to the use of the switches, the petitioner should have every right to assume that the switches as designed by the government would be operative when used as required in the

specifications. The Court of Claims so held in the case of *Ithaca Gun Company, Inc. v. United States,* 176 Ct. Cl. 437. The Court of Claims held in *Tuffano Contracting Corp. & Anthony Grace & Sons, Inc. v. United States,* 174 Ct. Cl. 396, that where plaintiff's arguments are reasonable, problems of interpretation are to be resolved against the government, the party responsible for furnishing the specifications. The administrative record clearly shows that petitioner's position was reasonable and that petitioner acted in performance of the contract in accordance with its interpretation of the contract. The issue of respondent's liability turns upon a question of contract interpretation which amounts to questions of law. *Cf. Wingate Construction Co. v. United States,* 161 Ct. Cl. 131, 356 F.2d 535; *Beacon Construction Co. v. United States,* 161 Ct. Cl. 1. Any ambiguity which did exist in the specifications here was, at best, obscure in nature. Petitioner's failure to discover the matter before bidding, and, under the circumstances, was both justifiable and reasonable. All of the points of issue set forth here and most of the cases are cited in the decision of the Court of Claims in *W. G. Cornell Company of Washington, D. C., Inc. v. United States,* 179 Ct. Cl. __, decided April 14, 1967. The legal issues clearly indicate that petitioner is entitled to a trial *de novo* and that the summary judgment was in error.

5. The petitioner contends that the points of issue with regard to its complaints in both the Recorder Claim and the Switch Claim amounted to a breach of contract as pleaded in its petition in the Court of Claims. When the government contracts for supplies to be manufactured in accordance with government specifications, there is an implied warranty that if specifications are followed, a satisfactory product will result and if the warranty is breached, *i.e.*, the specifications are defective, the plaintiff is entitled to damages. *Hol-Gar Manufacturing Corp. v. United States,* 175 Ct. Cl. 578, 360 F.2d 634. As there has been a breach of contract, petitioner is entitled to a full, judicial trial *de novo.* See *Morrison-Knudsen Co.,* supra; *Gus Kraus,* supra; and the

dicta in *Utah Construction and Mining Co.*, supra, together with the cases cited therein.

6. The petitioner contends that the presiding Board member deprived it of its right to a full and impartial hearing. The course and conduct of the Board member during the hearing was not fair and impartial. The denial of petitioner's request to recess or reconvene the hearing for the purpose of bringing in rebuttal evidence was not a matter of discretion for the presiding Board member to exercise. In the interest of giving the petitioner its right to a full and impartial hearing, the Board member as a matter of law should have granted petitioner's request to recess or reconvene the hearing at a later date. In the case of *Willner v. Committee on Character and Fitness,* 373 U.S. 96; *Gonzales v. United States,* 348 U.S. 407; and *Morgan v. United States,* 304 U.S. 1, it was held that when the agency making the decision rules on evidence that the claimant has no chance to refute, the hearing becomes infested with a procedure that lacks fundamental fairness the citizen expects from government.

Even though the petitioner did not constantly object to the unfair and biased conduct of the presiding member, the Court of Claims was in error in not finding that the petitioner was deprived of its right to a full, fair and impartial trial and should either have remanded the matter to the Board for further consideration or given the petitioner its right to a full, fair and impartial trial. In the case of *Adams Dairy Company v. St. Louis Dairy Company,* 260 F.2d 46, the Circuit Court held that, notwithstanding the absence of any objection or exception taken to the conduct of the judge in the lower Court, the Court, pursuant to its duty to determine whether the parties had been denied substantial justice, must give full consideration to the contention that misconduct on the part of the trial judge had deprived the plaintiff of a fair and impartial trial.

7. It is important to note that even though the difficulties delayed the completion of the contract for approxi-

mately two years, there was no formal request for extension of the completion date. The respondent acquiesced in the continuation of the contract and was fully informed at all times of the progress and constantly urged the petitioner to continue work on the contract. The breach of contract is thus not within the disputes clause of the contract or subject to a factual, final determination by the Board. The petitioner is entitled to a full judicial trial *de novo* to prove the damages that accrued from the breach. *Bianchi,* supra. The disputes clause of the contract and the pertinent parts of the default clause are printed in Appendix B of this petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Manuel Auerbach
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Of Counsel:
Michael Leo Looney

APPENDIX A

In the United States Court of Claims

No. 94–65

(Decided March 17, 1967)

REMLER COMPANY v. THE UNITED STATES

Manuel Auerbach, attorney of record, for plaintiff.
Mary M. Schroeder, with whom was *Assistant Attorney General Barefoot Sanders*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

OPINION

PER CURIAM:* This is a contract case in which the Armed Services Board of Contract Appeals denied an appeal in which plaintiff requested the Board to direct the contracting officer to issue a change order granting an equitable adjustment to cover extra costs incurred in procuring and installing for the Department of the Navy two specified components in ships' audio entertainment systems.[1]

The case is before the court on defendant's motion for summary judgment. In support of its motion, defendant relies on the pleadings and indicated portions of the administrative record which in its entirety includes numerous exhibits and three volumes of testimony before the Board. In response to defendant's motion, plaintiff's counsel has filed a number of briefs (including a special supplemental brief permitted

*This opinion incorporates, with minor changes, the opinion prepared by Trial Commissioner Richard Arens at the request of the court, under Rule 54(b). The facts are stated in the opinion.

[1] ASBCA No. 5660, decided April 30, 1962.

by the court). This opinion is based upon an examination of those portions of the administrative record referred to and cited by the parties in their various briefs.

The Recorder Claim

The specifications of the contract which was awarded to plaintiff on June 13, 1955, set forth in detail the performance requirements for the recorders which were to be installed in the ships' audio entertainment systems, but made no mention of a brand name or manufacturer. Plaintiff contends, in essence, that at the time of the award, the only commercially available recorder which met the requirements of the specifications in all respects was a certain model of the Magnecorder, and that the specifications were, therefore, so restrictive in nature as to indicate that a bidder would be required to purchase the Magnecorder; that plaintiff prepared its bid on the understanding that the Magnecorder was intended by the Navy; that shortly after the contract was awarded, the manufacture of the Magnecorder was stopped; and that as a result, plaintiff was obliged to incur extra expense in modifying another recorder to meet the specifications.

The Board found that, for commensurate prices, other competent manufacturers could make the recorder to the specified requirements, and that at the time of the award of the contract, there was advertised, as available, another brand of recorders, in addition to the Magnecorder, which with only minor adaptation, would conform to the specified requirements. In denying plaintiff's appeal on the recorder claim, the Board stated:

> In sum, we find no evidence of any statement, act, or omission chargeable to representatives of the Government, and no basis in the terms of the invitation, the bid, or the awarded contract, in support of the proposition, essential to Appellant's case, that the Government represented to Appellant or all prospective bidders that the Government would assume the supplier's normal risk of component availability at costs commensurate with the prices to be offered by them. We conclude that the Government does not have contractual responsibility for the events giving rise to the recorder claim and is not liable under the contract "Changes" article or otherwise for costs of the kinds included therein, and the appeal therefore will be denied as to that claim.

These facts as found by the Board are amply supported by the record, and clearly negate plaintiff's main thesis regarding the restriction of the contractor to the Magnecorder. *River Construction Corp.* v. *United States*, 159 Ct. Cl. 254 (1962). Moreover, the question of law, *i.e.*, interpretation of the contract documents, which the recorder claim presents and which is resolved independently by the court,[2] must be decided against plaintiff. A reading of the specifications compels the conclusion that there was no mention directly or indirectly of a brand name or manufacturer and that only performance requirements were specified. The elements of the instant case are in marked contrast to the elements of *Jack Stone Co.* v. *United States*, 170 Ct. Cl. 281, 344 F. 2d 370 (1965). In the *Stone* case, the specifications contained a brand name for a particular item of equipment, but the contract also provided that articles identified by name, make or catalogue number should be interpreted as establishing a standard of quality and not as limiting competition. The court ruled that the plaintiff in the *Stone* case was not required to furnish the brand name equipment alone, but could furnish equipment from another source if equal to the brand name equipment.

In the instant case, it is clear that plaintiff anticipated using the Magnecorder in the installation. Plaintiff was not, however, required by the contract to use the Magnecorder and the fact that its manufacture was stopped and that plaintiff incurred extra expense in modifying another recorder to meet the specifications, was not the fault of the Government. *Rolin* v. *United States*, 142 Ct. Cl. 73, 160 F. Supp. 264 (1958); *Vogt Brothers Mfg. Co.* v. *United States*, 160 Ct. Cl. 687 (1963); *Merritt-Chapman & Scott Corp.* v. *United States*, *supra*. Plaintiff's recorder claim must accordingly be denied.

The Switch Claim

There are two interwoven theories advanced by plaintiff on its switch claim. The first is substantially the same as its theory on the recorder claim, namely, that the specifications were so restrictive that the switches were available from only

[2] *Merritt-Chapman & Scott Corp.* v. *United States*, 174 Ct. Cl. 250, 355 F. 2d 622 (1966).

one manufacturer who experienced considerable manufacturing difficulty which caused plaintiff delay and extra expense. The second theory is that defendant's specifications for the switches were defective. The net result, so plaintiff contends, is that defendant is liable for plaintiff's extra costs.

It is clear that the specifications and the drawings did not indicate by whom the switches were to be manufactured, but were, as in the case of the recorders, only prescriptions of contents and performance. Although, there was conflict in the testimony before the Board relating to conversations between the parties regarding "approved" sources of the switches, there was substantial evidence to support the following findings of the Board:

> * * * We find on the record that Appellant estimated and submitted its low bid covering 26 program consoles and a prototype unit requiring the use of 205 multi-deck rotary switches with the knowledge that there were only two past producers of the required switches; with the understanding that Firm A would not be available to it as a supplier of the switches; and with the knowledge (not communicated to or shared by representatives of the contracting Bureau) that the past performance of Firm B in furnishing Appellant with single-deck switches of the same type for use under contracts with other Naval activities had proved to be less than satisfactory. As in the case of the recorder claim, * * * we find nothing in the circumstances surrounding Appellant's preparation and submission of its bid or in the contract itself which serves to shift from Appellant to the Government the general contractual responsibility for the future availability of conforming switches for use in the consoles to be delivered by Appellant thereunder.

The two principal difficulties encountered by the manufacturer of the switches, intermittent electrical contacts and shaft breakage, were the subject of testimony before the Board by expert witnesses who differed respecting the cause of the difficulties, but there was substantial evidence to support the following findings of the Board:

> * * * we find that Appellant has not established by a preponderance of the evidence that any of the difficulties underlying its switch cost claim were either caused by limiting requirements of the general guidance drawing or relieved by any change in the requirements thereof,

> and that evidence for the Government affirmatively establishes that the difficulties concerning so-called "design" matters are not related to matters of limiting "design" established by the guidance drawing but with matters of manufacturing "design" involved in the supplier's detailing of methods for fabrication within the scope of the general requirements. We find further that Appellant's supplier exchanged defective and malconforming switches on hand at no additional cost and without any ordered change in the guidance drawing, and in summary that the record establishes the matters of switch procurement difficulty complained of by Appellant to be within the area of its responsibility under the contract.

Although defendant did make changes in the switch specifications, the evidence does not establish that the specifications were faulty or that, if faulty, they caused the delay and extra expense. In *J. D. Hedin Construction Co.* v. *United States*, 171 Ct. Cl. 70, 347 F. 2d 235 (1965), this court stated (pp. 82–3):

> It is well settled that the government is relieved of liability irrespective of its faulty specifications, where the actual delays were occasioned by factors outside the government's control. * * * Such a determination is strictly a factual one * * *.

Plaintiff's switch claim, on the authority of *River Construction Corp.* v. *United States*, *supra*, must also be denied.

"Attitude" Of The Presiding Board Member

In its petition plaintiff contends that the attitude of the presiding Board member of the Armed Services Board of Contract Appeals was not impartial and that he was not fair. The contention is apparently based upon (1) a statement allegedly made before the commencement of the transcribed hearing in which the presiding Board member "chastised" plaintiff for untimely action in its case, (2) the rulings in favor of the Government and/or against plaintiff on admissibility of evidence, and (3) a denial by the presiding Board member of plaintiff's motion to recess and reconvene at a later date for further testimony.

There is no indication in the record which is before this court that the presiding Board member "chastised" plaintiff;

nor does the record reflect any objection or protest by plaintiff in the administrative proceedings to any such alleged chastisement. In *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952), the Supreme Court stated:

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Assuming arguendo that before the commencement of the transcribed hearing, the presiding Board member made an unduly harsh comment to plaintiff regarding untimely action, no pattern of unfairness or partiality appears on the record in the rulings made by the presiding Board member; the denial of plaintiff's motion to recess and convene at a later date for further testimony does not appear to be an abuse of discretion; and the ultimate findings and conclusions of the Board are amply supported by the record. *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F. 2d 46 (8th Cir. 1958).

Accordingly, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

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APPENDIX B

Disputes Clauses

ASPR 7-103.12 (Rev. 6-23-54)

DISPUTES: The clause of the General Provisions entitled "Disputes" is deleted in its entirety and the following clause substituted in lieu thereof:

> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; *provided* that, if no such appeal is taken the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

DEFAULT:

Pertinent sections of Paragraph No. 11, Default under General Provisions, Standard Form 32, prescribed by General Services Administration, Nov. 1949 Edition, are briefly set out for information:

(a) The Government may, * * * terminate the whol or any part of this contract in any one of the following circumstances: (i) *if the Contractor fails to make delivery of the supplies or to perform the ser ices within the time specified herein or any extensio thereof; or (ii) if the Contractor fails to perform an of the other provisions of this contract, or so fails to make progress as to endanger performance of thi contract in accordance with its terms, * * *. (b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor.* Such causes include * * * acts of the Government * * * default of subcontractors due to any of such causes unless the Contracting Officer shall determine that the sup plies or services to be furnished by the subcontracto were obtainable from other sources in sufficient tim to permit the Contractor to meet the required deliv ery schedule. (c) * * * *Provided, That the Contrac tor shall continue the performance of this contract to the extent not terminated under the provisions o this clause.* (d) * * * *The Government shall pay to the Contractor the contract price for completed sup plies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government * * * Failure to agree shall be a dispute concerning a que tion of fact within the meaning of the clause of thi contract entitled "Disputes." * * * (Emphasis adde

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 250

REMLER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contracted with the Navy to deliver forty sound-amplifying systems for use on shipboard. After delivery, petitioner filed a claim for additional compensation with the Contracting Officer under the "changes" clause of its government contract (see, Pet. 4, n. 2). Petitioner's claim was based on two contentions: *first,* that the contract specifications, although not using brand names, were so phrased as to call for the use of "recorders" and "rotary switches" made by specific companies, and that the items were not available from those manufacturers when petitioner required them, so that petitioner had to incur the extra expense of having those items specially

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made; and, *second,* that inadequate contract specifications for certain switch components resulted in faulty switches, which had to be replaced at extra cost to petitioner. The Contracting Officer rejected petitioner's claims as unfounded.

Petitioner appealed that decision to the Armed Services Board of Contract Appeals pursuant to the standard "disputes" clause of its contract and the Armed Services Procurement Regulations.[1] After a hearing at which petitioner was given opportunity to introduce evidence and present written and oral argument in support of its contentions, the Board of Contract Appeals upheld the Contracting Officer's decision. The Board ruled that the contract did not require any particular "brand" of component, but rather set out performance requirements for the items in question, and found that a number of firms could have met the specifications for the required recorders. On the basis of the evidence before it, the Board concluded that manufacturing errors, not faulty specifications, caused petitioner's difficulties with the switch components.

Petitioner sought review of the Board's decision in the Court of Claims, renewing the contentions it had presented to the Board and requesting a trial *de novo.* That court overruled petitioner's contention that it was entitled to a trial *de novo,* rejected petitioner's claims of alleged unfairness in the conduct of the Board and upheld the decision of the Board, as "amply supported by the record" (Pet. 18–23).

[1] ASPR 7-103.12 (Pet. 24); 32 C.F.R. 7.103-12 (1954 ed.).

Its decision is correct and further review is not warranted.

Petitioner's contention that he was entitled to a trial *de novo* in the Court of Claims is fully answered by this Court's decisions in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 and *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394. In both of those cases the Court recognized that where a claim arises under a provision such as the "changes" clause of a government contract, the Court of Claims may not review the matter *de novo* but is limited to reviewing the administrative record.[2] See, also, *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 512–513.

Nor is there any substance to the claim that, in reviewing the administrative record, the Court of Claims was derelict in failing to examine the three volume record for errors not cited by petitioner.[3] The court below followed ordinary appellate practice. *E.g.*, Court of Claims Rule 60(a)(4); Supreme Court Rule 40(1)(e), C.A.D.C. Rule 17(b)(5). Petitioner's position amounts to an assertion that the Court of Claims should have searched for errors which peti-

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[2] Petitioner contends in this Court (Pet. 9, 12) that the interpretation of the specifications of the contract was a question of law which should have been decided by the Court of Claims under the Wunderlich Act. In fact, the Court of Claims *did* consider the interpretation of the contract specifications *de novo* (Pet. 20), and agreed with the Board as to their meaning.

[3] Indeed, the Court of Claims, after petitioner had failed to point to portions of the record to support its claims, allowed petitioner to file an additional brief and held a second oral argument in order that petitioner might be afforded an opportunity to support its contentions from the record.

tioner was unable to find, and is apparently still unable to identify.[4]

The remainder of petitioner's assertions are disposed of by the Court of Claims' holding, affirming the Board's determination, that the government did not, by contract or otherwise, assume the risk that the components which the contractor intended to use would remain available, a risk normally born by the contractor.[5] The failure of petitioner's suppliers, through no fault of the government, hardly creates liability on the government to compensate petitioner for any losses incurred thereby.[6]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

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[4] Petitioner fails to point to any alleged error not raised and considered below.

[5] Petitioner's claim that the Board treated it improperly in failing to reopen the hearing (Pet. 10) to receive additional testimony by its witnesses is frivolous. The evidence offered was relevant only to a defense not reached by the Board or the Court of Claims. Thus there could be no prejudice in the evidentiary ruling. As to the purported lack of impartiality by the Board. (Pet. 16), which the Court of Claims found not to exist (Pet. 23), petitioner failed to make any objection before the Board in this connection or attempt otherwise to substantiate its charge.

[6] In fact, the Board found that the recorders could have been purchased from other sources for prices commensurate with those of the recorders petitioner had intended to utilize, and that petitioner's switch supplier replaced faulty switches at no extra charge. These findings were affirmed by the Court of Claims as "amply supported by the record" (Pet. 20).

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